UNITED
NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 758

Case No. 817: BALKENHOL-DE VRIES Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 24 October 1994, Sibylla Balkenhol-de Vries, a former staff member of the United Nations Conference on Trade and Development/General Agreement on Tariffs and Trade (hereinafter referred to as UNCTAD/GATT), filed an application requesting the Tribunal:

> "... to review the JAB's recommendation of 16 June 1994 and the subsequent decision of the Secretary-General of 20 July 1994, to quash said decision, to grant me reinstatement in my earlier position and to award me financial compensation of US$52,000.11

Whereas, the Respondent filed his answer on 30 June 1995;

Whereas, the Applicant filed written observations on 29 November 1995;

Whereas, on 1 and 3 July 1996, the Applicant submitted additional observations together with additional documents;

Whereas, on 10 July 1996, the Tribunal put questions to the Respondent, to which he provided answers on 15 July 1996;

Whereas, on 12 July 1996, the Respondent submitted an additional statement;

Whereas, on 17 July 1996, the Tribunal heard oral testimony, pursuant to article 17 of its rules;

Whereas, the facts in the case are as follows:

The Applicant entered the service of the International Trade Centre (ITC) of UNCTAD/GATT on 1 August 1985, on a one month short-term appointment, under the 300 Series of the Staff Rules, as a Research Clerk, at the G-3 level. The Applicant was granted a further short-term appointment of seven weeks from 4 November to 20 December 1985, as a Research Clerk at the same grade. On the recommendation of the Government of the Netherlands, pursuant to its Associate Expert Agreement with ITC, the Applicant was subsequently granted five consecutive intermediate-term appointments, under the 200 Series of the Staff Rules, as an Associate Expert (Trade Promotion). The first two of these appointments were for a fixed-term period of one year, at the L-1, steps III and IV level, from 5 January 1987 through 4 January 1989 respectively. The next appointments were also for a fixed-term of one year at the L.2, steps III and IV respectively, through 4 January 1991. The last appointment was for a fixed-term of six months at the L-2, step V level, from 5 January to 4 July 1991. On 5 August 1991, the Applicant was granted a three-month short-term appointment, under the 300 Series of the Staff rules, at the P-2 level, as an Associate Training Officer, through 4 November 1991. This appointment was renewed from 5 November 1991 through 31 December 1991, and again on 1 January 1992, for a period of one month. The Applicant separated from service on 31 January 1992, upon the expiration of her appointment.

In a memorandum dated 16 August 1990, the Chief, Training Section/Division of Trade Services (TS/DTS), informed the Director, DTS, that the Applicant's contract would expire in January 1991. He stated, "In view of her excellent performance in the Training Section and her proven contribution to the Section's activities, I

trust that it will be possible for ITC to offer [the Applicant] an opportunity to continue her association ... " He recommended that "every possibility be explored in order to retain (the Applicant] in the Training Section after January 1991".

In a further memorandum dated 13 March 1991, the Chief, TS, informed the Director, DTS, that "following discussions between ITC, representatives of the Dutch Ministry of Foreign Affairs and the Dutch Mission in Geneva, it was understood that every effort would be made by ITC to find a suitable employment commensurate with [the Applicant's] qualifications". In this connection, he attached a job description for a P-2 Training Officer.

In August 1991, the Applicant notified the Administration that she was pregnant, with the birth expected in mid-February 1992. According to the Applicant, a staff member in the Personnel Office told her at that time "that the moment for becoming pregnant was not well chosen". The Head, Regular Staff Unit (RSU), Personnel Administration Section (PAS), recorded in a note for the file dated 2 October 1991 that she informed the Applicant that, under a 300 Series appointment, she would not be entitled to maternity leave, and that:

> "Subject to
>
> (i) request for continuation of services
> (ii) availability of financing (unlikely beyond 31 December 1991)
> (iii) medical clearance
>
> her present 300 Series contract could be extended to a maximum of six months consecutive period."

In a memorandum dated 4 October 1991, the Chief, TS/DTS informed the Executive Director, through the Director/DTS, that the Applicant's contract would expire on 4 November 1991 and "to date no indication of an extension has been received". He noted that he was "extremely satisfied with the performance of [the Applicant]"

and recommended "an extension of her services with a view to the eventual integration of [the Applicant] into ITC". He also noted that the Applicant's contribution to the Training Section "had greatly increased since last August when a professional staff member of the section left ITC".

On 24 January and 31 January 1992, respectively, the Applicant applied for two internal vacancies. She was not selected for either post. According to the Applicant, the Chief of Personnel told her that if she were to pursue formal action against ITC, she "would have no friends at Personnel and reduce her chances of obtaining one of the vacant posts to nil." On 31 January 1992, the Applicant separated from service, upon the expiration of her appointment.

On 24 March 1992, the Applicant requested the Secretary-General to review the decision not to renew her short-term appointment beyond 31 January 1992. On 12 June 1992, she lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 16 June 1994. Its findings, conclusions, and recommendations read as follows:

> "27. Despite the foregoing, the Panel wanted to underline that often holders of temporary appointments can be misled in the sense that their supervisors being satisfied with the performance of the staff member, will assure them that their contract will be renewed, while not indicating that they themselves have no power of decision in this field. Hence, many short-term staff are led to believe that they will be kept on board because they are not properly warned that the decision process is not within the power of their direct supervisors who can only make recommendations concerning the staff member. Nevertheless, there exists no legally cognizable right with respect to further employment beyond the specified termination date in the contract.
>
> 28. The Panel then considered the efforts made by the Appellant to secure a regular appointment in ITC. The Panel noted that the Appellant had applied as an internal candidate for two vacancies in the Organization as reflected in her Official Status File and confirmed by both parties in their

replies to the Panel's request for further information. The Panel found that the correct procedures had been followed in the selection process for these two vacancies and that the Appellant's rights had been fully respected, a fact that the Appellant herself does not contest. Moreover, the Panel noted that the Appellant was not included on the ITC Roster of consultants because she had not requested it and that since she had not made any applications as an external candidate.

29. The Panel then went on to address the issue of sexual discrimination. The Panel, after a thorough review of all the facts and circumstances of the case, concluded that the Appellant brought forth no evidence whatsoever of any type of sexual discrimination. To the contrary, the Panel noted that the ITC had kept the Appellant on board up to 31 January 1992, i.e. two weeks before the expected date of delivery. Furthermore, the date of termination of the Appellant's contract coincided with the maximum period of six consecutive months of appointment for holders of short-term contracts in application of Staff Rule 301.1 and Administrative Instruction ST/AI/295 governing temporary staff and individual contractors.

30. The Panel also noted the Appellant's contention that her male colleague was granted an appointment exceeding six months of consecutive service under a series of short-term contracts. However, in light of the information provided by the Respondent, the Panel was satisfied-'that this colleague had never been granted an appointment exceeding six-months of continuous service under short-term contracts and that being on the ITC Roster he has been engaged on Special Service Agreements as an individual contractor.

31. In light of the foregoing, the Panel found that the Appellant's contention that she had been discriminated on grounds of gender was groundless.

32. In view of all the above, the Panel was satisfied that the discontinuation of the Appellant's employment was determined by the needs of the organization and that no prejudice or discrimination of any type influenced the decision to not renew the Appellant's contract.

Conclusions and recommendations

33. The Panel concludes that in accordance with the written law of the organization, a short-term contract gives no right of renewal to its holder and that in not renewing the

Appellant's contract the Organization correctly applied pertinent rules.

34. The Panel further concludes that the Appellant's applications for vacant positions were fairly considered and that it was her responsibility to make the necessary steps to secure another position within the Organization.

35. The Panel finally concludes that there is no evidence to indicate that the decision of non-renewal of the Appellant's short-term contract was motivated by prejudice or gender discrimination."

On 20 July 1994, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and advised her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusions that:

(i) the Organization correctly applied pertinent rules regarding the non-renewal of your contract;
(ii) your applications for vacant positions were fairly considered and it was your responsibility to take the necessary steps to secure another position within the Organization; and,
(iii) there is no evidence to indicate that the decision of non-renewal of your short-term contract was motivated by prejudice or gender discrimination.

He has also taken note that the Board made no recommendation in support of your appeal and, accordingly, the Secretary-General has decided to take no further action."

On 24 October 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's appointment was not renewed because of her pregnancy. Had she been a man, her appointment would have been renewed, as evidenced by the employment history of her male colleague and by the documented intent to make her a staff member.

2. The United Nations is bound by general principles of international law, which prohibit discrimination on the basis of sex, and which govern the 300 Series Staff Rules.

3. The JAB did not address the issue of gender discrimination.

Whereas the Respondent's principal contentions are:

1. The Applicant served on a short-term appointment which carried no expectancy of renewal beyond its expiration date.

2. The Applicant has adduced no evidence of discrimination based on gender and has failed to discharge the burden of proof to establish such prejudice.

The Tribunal, having deliberated from 8 to 26 July 1996, now pronounces the following judgement:

I. The Applicant contends that the Respondent's failure to reappoint her under some form of contractual arrangement beyond the expiration, in January 1992, of her short term contract under the 300 Series of the Staff Rules (the 300 Series appointment) resulted from the Respondent's discriminatory treatment of her, initially on the basis of her pregnancy and anticipated maternity and subsequently, on the basis of her intention to commence legal proceedings to contest her non-appointment.

II. To establish her claim of discriminatory treatment based on pregnancy and anticipated maternity, the Applicant relies on a negative comment about the timing of her pregnancy, allegedly made to her by the Head, Regular Staff Unit (RSU), Personnel Administration Section (PAS), the Respondent's insistence on discussing maternity leave benefits, despite the Applicant's repeated assertion that she was not requesting maternity leave, the non-renewal of her appointment, a request for her services which

was sent back to the Training Section for resubmission with a male colleague's name instead of her name, and the pattern of employment of this male colleague, who, she claims, is similarly situated.

III. To establish her claim of Respondent's retaliation against her, based on her intent to commence legal proceedings, the Applicant has submitted her account of a conversation with the Chief, PAS, during which he is said to have told her that if she were to pursue legal action against ITC, she "would have no friends at Personnel and reduce her chances of obtaining one of the vacant posts to nil." The Applicant has also submitted a statement from her former counsel, who reports on a conversation he had with the Head of the RSU, PAS in February 1992, "it is my clear recollection that [she] was upset upon learning that [the Applicant] was considering steps before the JAB with a view to obtaining a review of her case. I was made to understand that if [the Applicant] were to pursue this course of action she might jeopardize her prospects for obtaining future contracts or offers of the same from ITC".

IV. The Applicant has presented extensive documentation of communications, both oral and written, between herself and personnel officials, namely the Head, RSU, and the Chief, PAS. The Respondent denies that statements were made suggesting either that the Applicant's pregnancy was poorly timed, or that she would reduce the likelihood of her reappointment if she proceeded to file an appeal with the Joint Appeals Board (JAB). The Respondent acknowledges that, in several meetings beginning in August 1991 and continuing until 24 January 1992, the Applicant was informed that the terms of her 300 Series appointment did not include maternity benefits. He claims that she was requesting maternity benefits, which she denies.

V. To clarify a number of evidentiary questions, the Tribunal heard oral testimony from the Applicant and the personnel officials with whom she held discussions regarding her contractual status. Based on the testimony of these witnesses, the Tribunal finds that initially, in September 1991, the Applicant inquired about maternity leave in a meeting with the Head, RSU, but that upon being informed that there was no such leave under the 300 Series, she did not raise the question of maternity benefits again. The Applicant claims that she made every effort to secure another appointment, which would commence approximately one to two months following the birth of her child. The Applicant has expressed her puzzlement that the Chief, PAS, continued to raise the maternity benefit issue until one week before her separation in January 1992. In her oral testimony, the Head, RSU, confirmed that she believed the Applicant understood, after one conversation in September or October, that there were no maternity benefits. She also testified that the Applicant did not subsequently raise the issue of maternity leave with her.

VI. The Tribunal notes that between the Head, RSU, and the Applicant there was no confusion as to the maternity leave issue, and yet the Chief, PAS, continually raised this issue through January 1992, long after the question had been raised by the Applicant and answered by the Head, RSU. In his oral testimony, the Chief, PAS, explained his continuing inquiries as to maternity leave benefits as having been motivated by his concern "to be absolutely sure that the staff member would not be denied anything that she would possibly be entitled to". The Tribunal does not find this explanation satisfactory.

VII. The Tribunal has carefully examined the record to determine whether the Applicant was, as she alleges, treated in a discriminatory fashion in her efforts to secure further employment, in comparison with a male colleague who secured several contracts in the time period for which the Applicant had sought employment with ITC. The Applicant contends that the skills and experience of this colleague were comparable to hers. The Respondent disagrees. Both the Head, RSU, and the Chief, PAS, stated that the colleague was on a "different career path" from the Applicant. The Tribunal notes the two forms provided by the Applicant for the request of services, on one of which, dated 15 January 1992, her typed name is crossed out and the name of her male colleague written in, with a routing slip which says "pl[ealse resubmit a new request". The second form, dated 22 February 1992, has the name of her colleague typed in.

VIII. Regardless of whether the Applicant's male colleague was, in fact, similarly situated, the Tribunal notes that the record of that colleague's employment under a series of short-term contracts, which kept him employed for 10 of 12 months in 1992, suggests that opportunities for employment did exist which might have been available to the Applicant. The Respondent has indicated in his submissions before the Tribunal that the Applicant, unlike her colleague, was not on the ITC Roster of Consultants. This fact, apparently, resulted in a number of his consultancy contracts, for which the Applicant was not considered.

The Tribunal inquired of both the Applicant and the Respondent as to why the Applicant was not on the ITC Roster of consultants. The Respondent stated that the Applicant had never requested to be on the Roster. The Applicant stated simply that she did not know of its existence. In numerous meetings, the Applicant requested information about employment opportunities, indicating that she was interested in any type of employment contract or consultancy. The

Respondent has acknowledged that the Applicant is a highly educated, competent, and experienced employee, with more than four years of excellent service to the Organization. Yet the Respondent never informed the Applicant about the Roster of Consultants, which was the very vehicle by which she might have secured the employment she sought. The Tribunal finds this omission reprehensible. The Applicant contends that the Respondent was thinking of her as a pregnant employee who would soon have a child and was, for this reason, not of interest to the organization for further employment.

IX. Discrimination may be very tangible to the individuals involved, and yet very difficult to document and prove in accordance with judicial standards of evidence. The Applicant in this case has submitted some evidence suggesting an element of discrimination in the discussions which took place before the expiration of her appointment in January 1992. However, the Tribunal finds that she has not fully sustained the burden of proof. This is due to the absence of any particular post or consultancy for which the Applicant was qualified and for which the Applicant submitted her candidacy. The request for her services which was made and then altered by the substitution of her male colleague was a request that did not apparently lead to employment but was held in abeyance. The Respondent has provided information as to the downsizing of ITC during the period in which the Applicant was seeking employment. There were two vacant posts for which the Applicant applied, but recruitment was suspended for one of the posts and the Applicant was not successful in her application for the other post. She does not contest the recruitment process for these posts.

X. Nevertheless, the Tribunal acknowledges that the failure of the Respondent to place the Applicant's name on the ITC Roster of Consultants or to bring the Roster of Consultants to the attention of the Applicant in the course of discussions concerning her future employment might have been improperly motivated. If not, it was a demonstration of negligence on the part of the personnel officials involved; this harmed the Applicant in her efforts to secure reappointment and denied her the right to be fully and fairly considered for consultancy contracts.

XI. Finally, the Tribunal turns to the Applicant's contention that she was subject to retaliatory threats in the context of filing her appeal. The Respondent denies that any statements along these lines were made. In addition to the Applicant's written statements and oral testimony, the Tribunal notes that a written statement has been submitted by the Applicant's former counsel. In the light of this evidence, the Tribunal finds it likely that the Applicant was subject to retaliatory threats prior to filing her appeal with the JAB. The time frame is such that the Tribunal cannot determine whether these threats were in fact carried out. The Tribunal reiterates that retaliatory actions, or threats thereof, against individuals seeking redress of grievances is a most serious offence which must not be tolerated.

XII. For the foregoing reasons, the Tribunal orders the Respondent:

(a) To give the Applicant priority consideration for any position for which she applies, and for which she is qualified;

(b) To pay the Applicant the amount of $15,000.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. María VICIEN-MILBURN
Executive Secretary